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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLIOTT LEWIS, an individual, on behalf of himself, and all others similarly situated,

Plaintiff,

v.

WENDY'S INTERNATIONAL, INC., a Corporation; and DOES 1-20, inclusive,

Defendant.

Case No. 09-CV-7193 MMM (JCx)

Assigned for all purposes to Honorable Margaret M. Morrow

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[DEFENDANT'S JOINDER IN THIS MOTION IS FILED CONCURRENTLY HEREWITH]

Date: January 24, 2011
Time: 10:00 a.m.
Place: Roybal - Courtroom 780

PLEASE TAKE NOTICE that on January 24, 2011, at 10:00 a.m., before the Honorable Margaret M. Morrow in Courtroom 780 of the United States District Court for the Central District of California, Plaintiff Elliott Lewis will and does move for preliminary approval of the proposed class settlement in this case, and for entry of an order:

1. Preliminarily approving the Settlement Agreement, attached as Exhibit 1 to the Declaration of Douglas N. Silverstein;

2. Preliminarily certifying, for settlement purposes only, a class of individuals that shall include "All non-exempt hourly employees (specifically, Crew Members, Shift Supervisors, Shift Supervisors-Part Time, Shift Supervisors-in-Training, Assistant Managers, Assistant Managers-in-Training, Co-Managers, and General Managers-in-Training) who, at any time between August 31, 2005 and the Preliminary Approval Date, were employed by Wendy's in a corporate-owned store located in California" ("Settlement Class")

3. Appointing the Law Offices of Kesluk & Silverstein and Alan Burton Newman, P.L.C as class counsel;

4. Appointing Plaintiff Elliott Lewis as representative of the Settlement Class;

5. Approving the proposed Notice of Class Action Settlement ("Notice") and the accompanying "Exclusion or Opt-Out Request Form" ("Exclusion Request Form") (attached as Exhibits 1 and 2 to the [Proposed] Order Granting Preliminary Approval of Class Action Settlement and for Class Notice of Settlement and Fairness Hearing lodged concurrently herewith);

6. Authorizing mailing of the Notice and Exclusion Request Form to the Settlement Class; and

7. Scheduling a final settlement approval hearing to take place 90 calendar days following preliminary approval, or as soon thereafter as the matter may be heard.

Defendant Wendy's International, Inc. joins in this request for preliminary approval by separate concurrence filed herewith.

The motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Douglas N. Silverstein and attached exhibits, the Declaration of Elliott Lewis, the argument of counsel and upon such other material contained in the file and pleadings of this action.

DATED: October 15, 2010

KESLUK & SILVERSTEIN

By /s/
Douglas N. Silverstein, Esq.
Michael G. Jacob, Esq.
Attorneys for Plaintiff
ELLIOTT LEWIS, an individual, on behalf of himself, and all others similarly situated

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FEDERAL RULES OF CIVIL PROCEDURE

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Elliott Lewis ("Plaintiff") respectfully submits this memorandum of points and authorities in support of this Motion for Preliminary Approval of Class Action Settlement ("Motion"). Defendant Wendy's International, Inc. (hereinafter "Defendant" or "Wendy's") joins in this request for preliminary approval by separate concurrence filed herewith.

I. INTRODUCTION

Plaintiff Elliott Lewis and Defendant Wendy's (jointly the "Parties") have reached a full and final settlement of the above-captioned wage and hour matter, which is embodied in the Parties' Settlement and Release Agreement ("Settlement Agreement").[1] In accordance with the Settlement Agreement, Wendy's agrees to pay $1.5 million dollars as a common fund, non-reversionary settlement to Settlement Class Members, inclusive of attorneys' fees, costs and expenses, the service payment to the class representative, and claims administration costs.

The Parties jointly request that the Court preliminarily approve this settlement as it was reached through arm's-length negotiations with a private mediator experienced in class action litigation, and represents an excellent result for settlement class members throughout California. Class members will receive a settlement payment without: (1) hiring counsel, (2) filing an administrative claim, (3) filing a lawsuit, (3) producing documents, or (4) being deposed. In other words, class members will receive significant monetary awards without ever having to litigate their claims. Further, unlike in claims-made settlements (probably the majority of these types of cases), these class members do not even have to submit a claim form in order to receive a settlement payment.[2] In the absence of this settlement, the claims of many of the class members would be time-barred.

[1] A true and correct copy of the Settlement Agreement is attached as Exhibit 1 to the concurrently filed Declaration of Douglas N. Silverstein ("Silverstein Decl.")

[2] The only circumstance under which class members will need to do anything other than cash their checks is if they have moved and need to provide a change of address to the Claims Administrator.

By this Motion, the Parties respectfully request that the Court preliminarily approve the Settlement Agreement, conditionally certify the proposed settlement class, and enter the [Proposed] Order Granting Preliminary Approval of Class Action Settlement and for Class Notice of Settlement and Fairness Hearing ("Proposed Order") lodged concurrently herewith.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Elliott Lewis ("Lewis") worked as a non-exempt hourly employee at several Wendy's California corporate-owned stores for more than seven years, between December 2001 and March 2009. He was originally hired by Wendy's in December 2001, as a crew member at its Ontario, California restaurant. He voluntarily resigned from Wendy's on January 18, 2004, but was rehired three months later, on April 28, 2004, to work at the same store. In August 2005, Lewis was promoted to the position of Shift Supervisor at the Rancho Cucamonga restaurant. In October 2006, he transferred to the Beaumont restaurant in the same position where he worked until his resignation in March 2009.

This class action complaint, styled *Elliott Lewis v. Wendy's International, Inc.*, was filed on or about August 31, 2009 in the Superior Court of California, County of Los Angeles (Case No. BC 420922). On or about October 2, 2009, Defendant removed the matter to federal court, where it was assigned case number CV 09-07193 MMM (JCx) (herein "the Action"). On or about January 10, 2010, Plaintiff filed a First Amended Complaint in the Action. On or about April 14, 2010, Plaintiff filed a Second Amended Complaint ("Complaint") alleging, on behalf of himself and on behalf of all other Wendy's hourly employees in California, that Wendy's: (1) failed to provide hourly employees with meal breaks, (2) failed to provide hourly employees with rest breaks, (3) failed to pay premium wages owing for unprovided meal and/or rest breaks, (4) failed to provide accurate wage statements, (5) failed to pay earned and unpaid wages immediately upon termination of employment, and (6) violated California Business & Professions

Code Section 17200, *et seq*. by, among other ways, failing to pay premium wages for missed meal and rest breaks. Plaintiff also sought penalties against Wendy's pursuant to the Labor Code Private Attorneys General Act ("PAGA") as well as damages, other penalties, interest, disgorgement of profits and attorneys' fees and costs. The Complaint seeks to certify a class consisting of "All persons who are employed or have been employed as hourly employees by defendants in the State of California at any time since four (4) years prior to the filing of this lawsuit." (Second Amended Complaint, ¶35).

Prior to filing this case, Class Counsel conducted a thorough investigation into the facts of this Action, including a review of documents, Wendy's meal period waiver(s), and time sheets. Plaintiff's counsel has vigorously prosecuted this action by conducting extensive discovery, reaching out to class members, and obtaining and reviewing thousands of pages of relevant documents, including time records depicting the clock in and clock outs for a substantial portion of the proposed settlement class during the relevant time period.

Defendant disputes Plaintiff's claims and asserts that, during all relevant times, Wendy's had a policy of providing meal and rest breaks, and that it provides and has provided itemized wage statements that comply with California law as to all proposed settlement class members. Consequently, Defendant does not believe that any liability to Plaintiff or the class members exists, or that Plaintiff or class members are entitled to any recovery. Defendant also contends that Plaintiff is an inadequate class representative and that Plaintiff's claims are not suitable for class treatment.

Nevertheless, Defendant has concluded that it is desirable that the Action be settled in the manner and upon the terms set forth in the Settlement Agreement to avoid the further expense, inconvenience and distraction of continued litigation, and the risk of the outcome in the Action. Therefore, Defendant has determined that it is desirable and beneficial to put to rest the claims asserted in the Action.

Ongoing discussions between counsel for the Parties, formal and informal discovery, as well as the Parties' respective investigations into, and evaluations of Plaintiff's claims, have permitted each side to assess the relative merits of the claims and the defenses to those claims. The Parties agree that the investigation and evaluation, as well as the information exchanged during settlement negotiations and mediation, are more than sufficient to assess the merits of the respective Parties' positions and to compromise the issues on a fair and equitable basis. (Silverstein Decl. ¶¶ 6-11).

On August 31, 2010, the Parties mediated their disputes before David A. Rotman, Esq. Mr. Rotman is a highly-regarded mediator with extensive experience mediating wage and hour class actions. At the end of a full day of mediation, Mr. Rotman issued a mediator's proposal that both Parties accepted, reaching agreement to resolve on a class-wide basis the disputes raised in the Action.

III. THE PLAINTIFF CLASS

The proposed settlement class includes all non-exempt hourly employees (specifically, Crew Members, Shift Supervisors, Shift Supervisors-Part Time, Shift Supervisors-in-Training, Assistant Managers, Assistant Managers-in-Training, Co-Managers, and General Managers-in-Training) who, at any time between August 31, 2005 and the Preliminary Approval Date, were employed by Wendy's in a corporate-owned store located in California (hereinafter "Class", "Settlement Class" or "Settlement Class Members").

IV. SUMMARY OF THE SETTLEMENT TERMS

The proposed settlement requires Wendy's to pay a common fund, non-reversionary settlement of One Million Five Hundred Thousand Dollars ($1,500,000.00) to Settlement Class Members, including an Incentive Award to the Class Representative to not exceed Seven Thousand Five Hundred Dollars ($7,500.00), claims administration expenses of up to Fifty Thousand Dollars

($50,000.00), a payment to the California Labor and Workforce Development Agency under the PAGA, and payments for attorneys' fees and costs.

The Settlement Agreement provides that the Court may approve, and Defendant will not oppose, an award of attorneys' fees in an amount not to exceed 33 & 1/3% of the total settlement amount, or Five Hundred Thousand Dollars ($500,000.00), and litigation costs of up to Twenty Five Thousand Dollars ($25,000). The amount remaining after these payments is the amount available to distribute to the class ("Net Settlement Amount"), which will be no less than Eight Hundred Ninety Seven Thousand and Five Hundred Dollars ($897,500). The Settlement Class will be notified through mail at their last known addresses. Any returned envelopes from this mailing with forwarding addresses will be utilized by the Claims Administrator to locate the Settlement Class Members through reasonable and customary efforts used in the administration of such settlements, including checking the National Change of Address data base and performing a skip trace. In the event that there are any unclaimed funds, the Settlement Agreement provides that the funds will be donated to charity.

This is an excellent common fund settlement for members of the Settlement Class, who will automatically receive a settlement payment by mail unless they affirmatively opt-out of the settlement. As explained in more detail below, liability in this case was uncertain because of Defendant's arguments that its written policies complied with the law, and that some or all of the Class Members may have been provided breaks. Additionally, Defendant presented various defenses and considerable evidence that represented serious hurdles toward Plaintiff obtaining class certification and proving liability.

V. THE SETTLEMENT MEETS ALL CRITERIA NECESSARY FOR PRELIMINARY APPROVAL

Settlement is the preferred means of resolving litigation. *Officers for Justice v. Civil Justice Comm'n ("Officers for Justice")*, 688 F.2d 615, 625 (9th Cir. 1982).

Settlement is particularly appropriate because the costs, delays, risk, and uncertainties inherent in complex litigation might overwhelm any recovery the Class stands to obtain. *See id.*

A. The Role of the Court

When a proposed class-wide settlement is reached, the settlement must be submitted for court approval. Fed. R. Civ. P. 23(e). The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. *Staton v. Boeing*, 327 F.3d 938, 959 (9th Cir. 2003). Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all class members. The third step is a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and class members may be heard regarding the settlement. See *Manual for Complex Litig.* ("*Manual*"), *Second* § 30.44 (1993).

Preliminary approval is prerequisite to giving notice so that "the proposed settlement ... may be submitted to members of the prospective Class for their acceptance or rejection." *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 323 F.Supp. 364, 372 (D.C. Pa. 1970). Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is "fair, reasonable and adequate." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Manual, Third*, § 20.212. Instead, the question presented on a motion for preliminary approval of a proposed class action settlement is whether the proposed settlement is "within the range of possible approval." *Manual, Second* § 30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).

While the decision to approve a proposed settlement is committed to the Court's sound discretion, courts attach an initial presumption of fairness to a class settlement reached in arm's-length negotiations between experienced and capable

counsel after relevant discovery. *See Linney v. Cellular Alaska P'ship*, C-96-3008, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). The opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See e.g.*, *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of plaintiff's counsel should be given a presumption of reasonableness); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 956-66 (9th Cir. 2009) ("parties [and] counsel. . . naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value"). In the same vein, a court considering a motion for preliminary approval neither decides the merits of the underlying case, nor crafts a settlement for the parties. *Officers for Justice,* 688 F.2d at 625; *Vasquez v. Coast Valley Roofing, Inc.,* 670 F. Supp.2d 1114, 1120 (E.D.Cal. 2009) ("the settlement hearing is not to be turned into a trial or rehearsal for trial on the merits"). This Court should give deference to the opinion of counsel who, in addition to engaging in extensive discovery to reach the terms of the Settlement Agreement, are experienced in class actions, and grant this motion. Silverstein Decl. ¶¶ 6 - 11, 15 - 28.

B. Factors To Be Considered in Granting Preliminary Approval

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. No one factor should be determinative, but rather all factors should be considered. These criteria have been summarized as follows:

> If the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

Manual, Second §30.44, at 229. Here, the settlement meets all of these criteria.

1. <u>The Settlement is the Product of Serious Informed and Noncollusive Negotiations.</u>

This settlement is the result of extensive and hard fought negotiations. Wendy's denies each and every one of the claims and contentions alleged in this Action. Wendy's asserted and continues to assert many defenses thereto, and has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action.

In the litigation and during settlement negotiations, Defendant raised real arguments that highlghted the risks that Plaintiff faced at the certification stage. For instance, Defendant argued that Wendy's written policies and procedures were facially and legally compliant, and that while the instruction concerning the requirements to "provide" breaks was lawful and consistent, the manner of providing breaks at Wendy's was not standardized and not likely to be certified.

Defendant argued and pointed to facts demonstrating that each manager determines how to communicate to employees authorization and permission to take break periods. As a result, authorizations and grants of permission take many forms, vary from manager to manager, and also depend on which employee is being authorized to take a break period. Defendant also pointed to Court rulings in support of its arguments that Plaintiff faced an uphill battle in obtaining class certification and proving liability, noting that it appeared as though the Court was going to interpret the "provide" standard in the manner urged by Defendant, and which would render class certification difficult. *See* 3/24/10 Order (Doc. 30) at 19:4-9 ("While plaintiff's timesheet and pay statement indicate that Lewis did not take meal or rest breaks on certain dates and that Wendy's did not pay him additional compensation as a result, he does not allege ***why*** he failed to take breaks on the dates in question. Without additional allegations elucidating the circumstances that led Lewis to forego the breaks, the pleading fails to state a claim on which relief can be granted, as Wendy's was not required to ensure that Lewis took meal and rest breaks.") (emphasis added). *Compare Kimoto v. McDonald's Corp.,* No. CV 06-3032, 2008 WL 4690536, *6 (C.D. Cal. Aug. 19, 2008) ("The

Court cannot infer from the summary reports of various employees a company-wide policy of not authorizing meal or rest periods.").[3]

Despite its denial of wrongdoing, Wendy's has concluded that this Action should be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. Wendy's has decided to put to rest the class claims released in the Settlement Agreement.

Prior to agreeing to proceed with mediation of the dispute, the Parties conducted discovery, engaged in meet and confer sessions (and motions' practice) regarding discovery and the state of the pleadings, and entered into discussions and conference calls about about the nature and amount of data that would be provided in advance of a full day mediation. Prior to mediation, Defendant produced thousands of documents, including electronic time punch data.

Settlement negotiations took place before one of the preeminent mediators of wage and hour matters in California, David Rotman. After a full day of mediation, and reviewing the facts in this case, Mr. Rotman recommended a settlement amount to the Parties as a mediator's proposal. Counsel for the Parties both agreed to accept the mediator's proposal, based upon Mr. Rotman's expertise as a wage and hour mediator, and the uncertainties of protracted litigation. Silverstein Decl. ¶10.

By reason of the settlement, Wendy's has agreed to pay to the Settlement Class Members a common fund, non-reversionary $1.5 million settlement, as payment in full of all of Plaintiff's claims arising from the events described in the Complaint including Class Counsel's attorneys' fees costs and expenses, the Class

[3] The Court also appeared to approve the legality of Wendy's Waiver of Meal Period form, which was central to Plaintiff's claim. 3/24/10 Order (Doc. 30) at 13:15-15:12 (stating the waiver form "complies with the California Labor Code which states that an employee's 'meal period may be waived by mutual consent of both the employer and employee'"(quoting Cal. Labor Code § 512(a)).

Representative's Enhancement, payment of the PAGA award, and the cost of class notice and claims administration.

The Class Period begins on August 31, 2005 and continues through the date of preliminary approval of the settlement. Class Counsel has conducted a thorough investigation into the facts of the class action, including an extensive review of relevant documents and data, and has diligently pursued an investigation of the Settlement Class Members' claims against Wendy's. Based on the foregoing documents and data, and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Wendy's for the consideration and on the terms set forth in Settlement Agreement is fair, reasonable, and adequate, and is in the best interest of the class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Wendy's, and numerous potential appellate issues. Wendy's and Wendy's counsel also agree that the Settlement is fair and in the best interest of the Class Members.

Plaintiff and Class Counsel recognize that continuing to litigate and try this Action against Wendy's through possible appeals could take several years at considerable cost. Class Counsel also have taken into account the uncertain outcome and risk of litigation, especially in complex actions such as this Action. Class Counsel are also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the Action. Here the litigation has been hard-fought with aggressive and capable advocacy on both sides. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." *In re Wash. Public Power Supply Sys. Sec. Litig*., 720 F. Supp. 1379, 1392 (D. Ariz. 1989). Based upon their evaluation, Plaintiff and Class Counsel have determined that the settlement set forth in the Settlement Agreement is an excellent result and in the best interest of the Class Members. Silverstein Decl. at ¶14.

2. The Settlement Has no "Obvious Deficiencies" and Falls Within the Range of Approval.

The proposed settlement herein has no "obvious deficiencies" and is well within the range of possible approval. To evaluate the "range of possible approval" criterion, which focuses on substantive fairness and adequacy, district courts primarily balance plaintiffs' expected recovery against the value of the proposed settlement. *In re Tableware Antitrust Litig*., 484 F. Supp.2d 1078, 1080 (N.D. Cal 2007) ("Based on this risk and the anticipated expense and complexity of further litigation, the court cannot say that the proposed settlement is obviously deficient or is not "within the range of possible approval."); *Vasquez*, 670 F. Supp. 2d at 1120. Here, the settlement confers a substantial benefit on Settlement Class Members, while proceeding with litigation imposes considerable risks. See *Vasquez*, 670 F. Supp. 2d at 1114.

During the mediation process, Wendy's presented a number of defenses that presented serious threats to the claims of Plaintiff and the other Class Members. Silverstein Decl. ¶10. First, Wendy's contended that its handbooks and policies clearly and properly outlined its responsibilities under California law and precluded a finding of classwide liability on the basis of an unlawful policy. For example, Wendy's argued that:

- Each California restaurant manager, assistant manager and shift supervisor was required to sign Wendy's California Labor Law Summary. The California Labor Law Summary correlates shift lengths to break entitlements, and instructs managers / supervisors that "[a]ll hourly/non-exempt employees must be provided breaks according to the following schedule" (and then provides a break schedule even more generous than that required by California law).
- Managers and shift supervisors also received formal instruction from an HR Representative concerning the obligation to provide meal and rest breaks.

For example, a program received by Plaintiff Lewis instructed that: "Each hourly employee who works five hours or more in one shift is entitled to a full, uninterrupted half hour break." It provided that: "A break must be continuous, uninterrupted and at least 30 minutes in order to be unpaid. Breaks less than 30 minutes are counted as working time and the employee must be paid for the break. Breaks cannot be split."

- Each restaurant posted in its break room the California Industrial Welfare Commission's Wage Order ("Wage Order"), which advised employees of their entitlements to meal and rest breaks. The employee handbook further advised Wendy's employees that: "All federal and state labor posters must be posted in every restaurant. If you ever feel that you have not been treated fairly, speak to your supervisor or use the Wendy's 'Speak Out' program. It's designed to solve problems and answer questions." *Compare Perez v. Safety-Kleen Sys., Inc.,* 253 F.R.D. 508, 515 (N.D. Cal. 2008) (granting summary judgment in favor of employer; "Plaintiffs cite no authority, however, for the proposition that an employer is required to schedule meal breaks for its employees or to inform employees of meal break rights other than to post Wage Order posters.").

In addition, Wendy's also pointed to considerable evidence and authority[4] to support its arguments against class certification. Silverstein Decl. ¶ 10. For example, Wendy's argued that, though its instruction concerning the requirements to "provide" breaks was consistent, the ***manner*** of providing breaks at Wendy's was

[4] *Brown v. Federal Express Corp.*, No. CV 07-5011, 2008 WL 906517, *7 (C.D. Cal. Feb. 26, 2008) (determination whether the defendant made meal periods available requires "substantial individualized fact findings"); *Blackwell v. Sky West Airlines, Inc.*, 245 F.R.D. 453, 468 (S.D. Cal. 2007) (rejecting plaintiff's argument "that meal period allegations can be verified simply by reviewing Defendant's time records from those stations that used a time clock during the class period"; holding that individual questions predominate in claim that employer failed to provide 30-minute meal periods); *Lanzarone v. Guardmark Holdings, Inc.*, 2006 WL 4393465, *1, *6 (C.D. Cal. Sept. 7, 2006) (meal and rest period claims inherently present individualized questions).

not standardized. It was ad hoc and varied from store to store and manager to manager. Each manager determined how to communicate to employees authorization and permission to take break periods. As a result, Wendy's argued, authorizations and grants of permission take many forms, vary from manager to manager, and also depend on which employee is being authorized to take a break period. Specifically, Wendy's argued that:

- Employees often took breaks but failed to punch out. Indeed, as many courts have noted, all incentives run against punching in and out for breaks even if taken. If a meal period was not punched the employee was paid for the time (no small consideration for employees with few hours and making close to the minimum wage). And rest breaks were paid in any event. As such, punching out for them was widely considered to be a "hassle" for which the employee receives no benefit. *Compare Kimoto,* 2008 WL 4690536, at *6-7 ("The Court cannot infer from the summary reports of various employees a company-wide policy of not authorizing meal or rest periods. First, there is no financial incentive for an employee to clock in and out for a ten-minute rest period, since that employee will get paid regardless.").
- Employees often elected to skip a lunch or rest break for any number of reasons (including to get paid for a lunch break).
- Employees sometimes forget to take a break.
- The timekeeping system sometimes failed to record a break that was entered because, for example, the break took place after Midnight and the system will not record it because it is considered a new day and shift.

Wendy's argued that these considerations presented fact-intensive, highly variant, and individualized scenarios, each of which would have to be resolved separately before there could be any assessment of any violation of law.

Wendy's further argued that – even if the absence of a time punch could be said to "prove" a "violation" of law – the time punch detail established no company

practice at any level. Wendy's highlighted *Kenny v. Supercuts, Inc.,* 252 F.R.D. 641, 646 (N.D. Cal. 2008), where plaintiff argued that the time records of 68 declarants – which records showed that the declarants did not clock out for a full 30-minutes approximately 40% of the time – "create[d] an inference of a company-wide practice that interfered with the employees' right to a meal break." *Id*. In rejecting that theory, the court stated:

> The time records actually demonstrate the individual nature of the inquiry. Some of these employees clocked out for their full 30-minute meal break nearly all the time, some none of the time, and some part of the time. This disparity suggests that "the availability" of meal breaks varied employee to employee, or at least store to store or manager to manager. Even plaintiff herself admits that she took her full 30-minute meal break 60 percent of the time.

Id.; *see also Kimoto*, 2008 WL 4690536 at *6 (such "time records actually demonstrate the individual nature of the inquiry," and why class treatment is not permissible).

Wendy's then argued that its electronic timekeeping records reflected even more variability than the timekeeping records that were deemed too variable to support class certification in *Kenny*. Wendy's analysis of time punch data from its California restaurants showed that the actual recording rates of breaks varied widely from store to store, manager to manager, and even as to individual employees working the same days and shifts under the same manager. Specifically, Wendy's argued that:

Across restaurants (with each store averaged):

- The instances of crew shifts over 6 hours for which the time entries record no meal break varied from less than 1% on average within some stores to over 30% in other, and that for crew shifts over 5 hours, just 16.7% of time punches (averaged across all restaurants) do not record the eligible meal period. The percentage drops significantly if one excludes shifts of 6 hours or less. On average across restaurants just 9.6% of time punches for shifts over 6 hours did not record the eligible meal period. 90.4% did record them.

- The instances of crew shifts in excess of 3.5 hours for which the time entries did not record eligible rest break(s) varied from 9.8% or less in some stores to more than 30% on average in others. Again, Wendy's argued, these deviations are huge, and show no pattern or practice to permit class certification. Averaged, 72.1% of the time punches for rest eligible shifts showed the eligible rest periods as recorded.
- The instances of shift supervisor shifts over 6 hours for which the time punches record no meal break varied from less than 4% on average within some stores to over 40% in others. Again, Wendy's argued, these deviations (even in averages) are huge, and evidenced no pattern or practice to permit class certification.
- The instances of shift supervisor shifts of in excess of 3.5 hours for which the time punches did not record the eligible rest break(s) varied from less than 30% on average within some stores, to more than 40% in others.

In same restaurant (with each person averaged):

- Wendy's argued that even store averages (used above) did not reveal the deviation within each store by individual. To illustrate just one store (Lewis' store), the number of unrecorded eligible meal breaks varied within that store by individual from 1.5% to 62%.

In the same restaurant, in the *same shift* on the *same day*:

- Wendy's argued that even if one compared workers in the same restaurant, working the same shift and on the same day, there was enormous variation concerning who did and did not record that he/she took eligible meal breaks. Comparing one individual versus all others who worked the same shift as him on the same day in the same restaurant, and isolating days when this employee did not record a meal, showed that anywhere from 33% to 100% of his co-workers that day and shift did record meals. Wendy's argued that to

determine why one recorded the meal, but others did not, is highly fact-specific and individualized.

After vigorous negotiations, the mediator presented the Parties with a proposal of $1.5 million to resolve the Action. Recognizing the potential risks inherent in continued litigation, both sides agreed. As the federal court recently held in *Glass v. UBS Financial Services,* where the Parties faced uncertainties similar to those here:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

2007 WL 221862, at *5 (N.D.Cal.2007).

The proposed settlement eliminates the need for a lengthy, uncertain, and expensive trial or series of trials, or worse. The settlement further eliminates the risk of a denial of certification, which would force members of the Class to proceed on a plaintiff-by-plaintiff basis. By eliminating the risk of uncertain outcomes in litigation, the Settlement Agreement reflects economies of time, effort, and expense, by eliminating the need for individual litigation on what are, on average, relatively modest claims. The settlement provides prompt and substantial relief to all absent Class Members, without the attendant risk of additional and uncertain litigation. Moreover, judicial resources are conserved. This settlement thus affords the proposed Class with prompt, efficient relief, while avoiding the expenses and burdens of trial. All of these factors weigh heavily in favor of approving the settlement.

3. The Settlement Does Not Improperly Grant Preferential Treatment To The Class Representative Or Segments Of The Class.

The settlement agreement does not improperly grant preferential treatment to the class representative or segments of the Class. Members will be eligible to receive amounts based on their position and the amount of workweeks during which, Plaintiff argues, Class Members did not receive adequate compensation. Class Members who terminated their employment after April 16, 2007 will receive an additional lump sum to compensate for what Plaintiff argues is Wendy's failure to pay all wages due at termination.

Furthermore, Plaintiff submits that the enhancement fee of $7,500.00 for the Named Plaintiff is reasonable. Enhancement fees are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action. *See In re Mego Fin. Corp. Sec. Litig*., 213 F.3d at 463. An enhancement fee in the amount of $10,000.00 has been found to be a reasonable enhancement fee. *Wells v. Allstate Ins. Co*. 557 F. Supp. 2d 1, 8-10 (D.D.C. 2008).

Plaintiff contends that the incentive payment sought is reasonable because Mr. Lewis was integral to the investigation and litigation of this claim, and the fee is intended to compensate him for the risks of undertaking this litigation, including the potential liability for costs of suit. Mr. Lewis took his duties as a class representative seriously and regularly contacted class counsel to obtain status updates or check that the matter was proceeding as anticipated. Mr. Lewis conferred with our office approximately weekly to provide information about witnesses, develop questions for interviews, and respond to arguments presented by Defendant. Mr. Lewis made himself available to come to counsel's office to assist with the drafting of targeted discovery, assist Counsel in finding and interviewing other class members and to review and analyze thousands of pages of documents provided by Defendant. (Lewis Decl. ¶¶ 2-7). Mr. Lewis also made himself available during the mediation and was instrumental in bringing the mediation to a successful conclusion. Plaintiff submits that for his stalwart dedication to this case

and the benefit to the public which this settlement has conferred, the Class Representative enhancement fee should be rewarded. (Silverstein Decl. ¶¶ 41 - 44).

The settlement further allows for the allocation of up to 33 1/3%, or $500,000 of the settlement to be awarded as attorneys' fees. This request for attorneys' fees is well within the range of possible approval for a class action settlement where counsel has secured a common fund for the Class. (Silverstein Decl. ¶¶ 36 - 40). In accordance with the recent holding in *In re Mercury Interactive Corp. Sec. Litig.*, 2010 WL 3239460 (C.A.9 (Cal.)), Plaintiff will file an application for attorney's fees no less than fourteen (14) days prior to the deadline for putative class members to object to the settlement, and schedule the application to be heard on the same date and time as the Final Approval Hearing.

VI. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES

For cases where no class has yet been certified, the Court must certify the Class prior to approving the settlement. *See Vasquez*, 670 F. Supp. 2d at 1120.

A. The Proposed Class Should Be Certified Under Rule 23(a) and (b).

To effectuate the settlement for settlement purposes only, Wendy's has agreed to jointly request certification of the Settlement Class pursuant to the Parties' Settlement Agreement, with the proposed Class is defined as: "All non-exempt hourly employees (specifically, Crew Members, Shift Supervisors, Shift Supervisors-Part Time, Shift Supervisors-in-Training, Assistant Managers, Assistant Managers-in-Training, Co-Managers, and General Managers-in-Training) who, at any time between August 31, 2005 and the Preliminary Approval Date, were employed by Wendy's in a corporate-owned store located in California."

In light of the Parties' agreement, the Court's threshold task is to determine whether the proposed settlement class satisfies the requirements to Rule 23(a) and Rule 23(b)(3). Fed. R. Civ. P. 23. Here, the Court can find that the Class easily meets the numerosity, commonality, typicality and adequacy of representation

requirements of Rule 23(a). In addition, the Class satisfies the Rule 23(b)(3) requirements of predominance of common issues and superiority of the class action device. Furthermore, because the proposed Settlement eliminates the need for trial, no barrier to certification exists. The settlement meets all of these criteria.

1. Members Of The Class Are So Numerous That Joinder Of All Members Is Impracticable.

Rule 23(a)(1) requires that the proposed class be so numerous that joinder of all class members is impracticable in light of the particular circumstances of the class. Plaintiff need not, however, show that the number is so large that it would be impossible to join every class member. *Harris v. Palm Spring Estates, Inc*. 329, F.2d 909, 913-14 (9th Cir. 1964); *Murray v. Local 2620, Dist. Council 57, AFSCME, AFL-CIO*, 192 F.R.D. 629, 631 (N.D. Cal. 2000). Instead, an attempt to join all parties must only be difficult or inconvenient. *Harris*, 329 F.2d. at 913-4.

Here, the Plaintiff Class is comprised of approximately 8,891 employees. Silverstein Decl. ¶30. As such, the Class represents a distinct group of plaintiffs whose members can be identified with particularity from Wendy's records, so as to make it administratively feasible to determine individual class membership. *See Campbell v. Price Waterhouse Coopers, LLP*, 253 F.R.D. 586, 593 (E.D. Cal. 2008). These class members are not only identifiable, they have been identified already. Judicial economy is clearly served if the members of the Class can settle their claims together in this action rather than individually in separate actions. It is unlikely that the majority of the members of the Class have the financial resources necessary to pursue individual claims. Based on the foregoing circumstances, the Class satisfies Rule 23(a)(1)'s numerosity requirement. *See, e.g.*, *Gaspar v. Linvatec Corp*., 167 F.R.D. 51, 56 (N.D. Ill. 1996) (finding that plaintiff's proposed class of 18 satisfied the numerosity requirement); *Grant v. Sullivan*, 131 F.R.D. 436, 446 (M.D. Pa. 1990) (holding that courts can certify a class made up of as few as 14 members).

2. Common Issues of Law and Fact Unite the Class.

The threshold for finding commonality under Rule 23(a)(2) is not high. It requires only that there exist "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) requires that there be questions of law or fact common to the class. The commonality preconditions of Rule 23(a)(2) are "construed permissively." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). "'All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts couples with disparate legal remedies within the class.'" *Staton v. Boeing Co*., 327 F.3d 938, 953 (9th Cir. 2003) (quoting, *Hanlon*, 150 F.3d at 1019). Members of the class may possess different avenues of redress, but their claims must stem from the same source. *See*, *Hanlon*, 150 F.3d at 1019; *see also Parra v. Bashas, Inc.,* 536 F.3d 975, 979 (9th Cir. 2008) (reversing trial court for failing to find commonality; commonality was established where a class of Hispanic employees sued for past pay discrimination. Even though their individual factual situations differed, all employees sought a common legal remedy for a common wrong).

Not every issue in the case must be common to all class members. But to justify class action treatment, there must be issues "common to the class as a whole"; and relief must "turn on questions of law applicable in the same manner to each member of the class." *Gen. Tel. Co. of Sw. v. Falcon,* 457 US 147, 155, 102 S.Ct. 2364, 2369 (1982). Rule 23(a)(2)'s "common question" requirement creates only a "low hurdle" to class certification. *Williams v. Mohawk Indus., Inc.,* 568 F.3d 1350, 1356 (11th Cir. 2009).

This case presents numerous common questions of law and fact that satisfy the requirements of Rule 23(a)(2), including but not limited to:

- Whether Defendant violated Wage Order No. 5-2001 and Sections 226.7 and 512 by failing to pay wages to class members for failing to provide meal breaks and rest breaks; whether Defendant failed to provide the

required meal or rest breaks; whether employees worked more than five (5) hours without a meal break; whether employees who signed Defendant's meal period waivers were provided rest breaks and/or worked more than six (6) hours without a meal break;

- Whether Defendant violated Sections 226, 226.3 and Wage Order 5-2001 by failing to provide accurate itemized wage statements and by failing to maintain accurate wage and hour records.
- Whether Defendant violated Sections 201-203 by failing to pay all wages due to former employees upon separation of employment.

These common questions are sufficient to satisfy Rule 23(a)(2). See, *Bibo v. Fed. Express, Inc*., 2009 WL 1068880 at *7-8 (N.D. Cal. 2009); *Wang v. Chinese Daily News,* 231 F.R.D. 602, 607-608 (D.D.C. 2008).

3. The Claims of the Plaintiff Are Typical of the Class Claims.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Supreme Court has noted that "commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157, n.13.

Representative claims are "typical" if they are "*reasonably coextensive* with those of absent class members; they need not be substantially identical." *Dukes v. Wal-Mart, Inc.,* 509 F.3d 1168, 1184 (9th Cir. 2007) (emphasis added; internal quotes omitted); *Hanlon*, 150 F.3d at 1020 ("Under the rule's permissive standards, representative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical."); *Williams*, 568 F.3d at 1357 (holding typicality satisfied where "claims or defenses of the class and the class representative arise from the *same event or pattern or practice* and are based on the same legal theory") (emphasis added). It is sufficient if the class representatives and the class "share a 'common issue of law or fact,'" *California Rural Legal Assistance v. Legal Serv. Corp*., 917 F.2d 1171, 1175 (9th Cir. 1990) (quoting *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975).

The claims of the named Plaintiff are typical of the claims of the Class. The named Plaintiff was employed by Defendant as hourly non-exempt employee in the State of California between August 31, 2005 and the time of preliminary approval settlement, the class period. Accordingly, the named Plaintiff is a Class Member. Like Class Members, Plaintiff sustained injuries and damages arising out of and caused by Defendant's common course of conduct in violation of laws and regulations that have the force and effect of law and statutes. A review of the documentation produced by Defendant, both formally and informally, reflected that the manner in which Defendant failed to provide meal and rest breaks and pay wages, and failure to provide accurate itemized statements, resulted in similar violations among the members of the Settlement Class.

4. The Named Plaintiff Has Fairly And Adequately Protected The Interests Of The Class.

Rule 23(a)(4) permits class certification so long as "the representative parties will fairly and adequately protect the interests of the class." The representation is "adequate" if: the attorney representing the class is *qualified* and *competent*, the class representatives are not disqualified by interests antagonistic to the remainder of the class and the named plaintiff must "prosecute the action vigorously" on behalf of the class. *In re Mego Fin'l Corp. Sec. Litig.,* 213 F.3d at 462; *Hanlon*, 150 F.3d at 1020; *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978).

Simply put, Rule 23 asks whether the representative plaintiff will vigorously prosecute on behalf of the class and has a basic understanding of the claims. This requirement has been met here. First, Plaintiff is well aware of his duties as a representative of the class and has actively participated in the prosecution of this case to date. Plaintiff participated extensively in discovery and investigation of the Action. Second, Plaintiff has retained competent counsel who has extensive experience in wage and hour class actions. Silverstein Decl. ¶¶ 15 – 28. Class

counsel meets the benchmark standards set forth in Rule 23(g). *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975). Class Counsel is currently litigating more than a dozen wage and hour class actions, and has litigated many dozens more. Third, there is no antagonism between the interests of the named Plaintiff and those of the Class. Both Plaintiff and the Members of the Class seek monetary relief under the same set of facts and legal theories. Under such circumstances, there can be no conflicts of interest, and adequacy of representation is presumed. *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268 (D. Minn. 1989).

5. Rule 23(b)(3) prerequisites are satisfied.

A class action for damages may be certified where: (1) the questions of law or fact common to the class "predominate" over questions affecting the individual members and (2) on balance, a class action is superior to other methods available for adjudicating the controversy. FRCP 23(b)(3). Common issues predominate, warranting that the matter be resolved through a class action. *Hanlon*, 150 F.3d at 1022 ("[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis"). Plaintiff Elliott Lewis and all putative Class members seek compensation for Defendant's failure to pay Labor Code section 226.7(b) premium wages for missed meal and rest breaks. The Class Members' potential legal remedies are identical. Any variations in the damages, such as those arising from different wages or schedules, are insufficient to defeat class certification. *Blackie*, 524 F.2d at 905-906; *Whiteway v. FedEx Kinko's Office and Print Serv., Inc.*, No. 05-2320, 2006 WL 2642528, at *4, 10 (N.D. Cal. Sept. 14, 2006). Nevertheless, these variations are accounted for in the settlement agreement in effort to achieve equity.

To certify a class, the Court must also determine "that a class action is superior to other available methods for the fair and efficient adjudication of the

controversy." Fed. R. Civ. P. 23(b)(3). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Valentino v. Cater-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009).

Superiority is satisfied in the present case because: (1) members of the proposed Class have little or no interest in individually controlling the prosecution of separate actions, and (2) prosecuting or defending separate actions at this stage would be impractical and inefficient. Furthermore, because the action is being settled, rather than litigated, the Court need not consider manageability issues that might be presented by the trial involving the issues in this case.

In short, resolution of the litigation by the Parties' Settlement Agreement is superior because it completely avoids duplicative litigation of common issues and prevents the problem of contradictory outcomes. As such, this action allows all of the Class Members' claims to be fairly, adequately, and efficiently resolved to a degree that no other mechanism would provide. *See Vasquez*, 670 F. Supp. 2d at 1123 (finding that a class action for settlement purposes was superior to other available methods for the fair adjudication of plaintiffs' wage and hour claims); *Rosenburg v. I.B.M.,*, 2007 WL 128232, at *4 (N.D. Cal.) (finding that class action device was superior to all other available methods for fairly and efficiently settling plaintiffs' misclassification claims).

VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court preliminarily approve the Settlement Agreement, conditionally certify the Settlement Class, authorize mailing of Notice to the Class, schedule a hearing date for Final Approval of Class Settlement, and enter the Proposed Order lodged concurrently herewith (and also attached to the Settlement Agreement signed by the

parties). Defendant Wendy's International, Inc. joins in this request for preliminary approval by separate concurrence filed herewith.

DATED: October 15, 2010

KESLUK & SILVERSTEIN

By **/s/**
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